

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SALOME GONZALES, JR.,

Defendant-Appellant.

UNPUBLISHED

September 19, 2006

No. 260596

Oakland Circuit Court

LC No. 2003-191219-FC

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), specifically the March 25, 1995, killing of an eight-year-old girl. On March 2, 2004, the trial court sentenced defendant as a second habitual offender, MCL 769.10, to life imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first contends that his trial counsel was ineffective because he failed to investigate or raise an insanity defense. Because defendant failed to challenge his trial counsel's effectiveness in a motion for a new trial or an evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice prong of the test, the defendant must "demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (emphasis in original).

The record discloses absolutely no documentation or other substantiation that defendant suffered any mental illness near the time of the charged offense. Although defendant's brief on appeal refers to a 1982 schizophrenia diagnosis and information concerning his substance abuse history purportedly appearing in the presentence information report (PSIR), there are no

references to either schizophrenia or substance abuse in the PSIR, which instead repeatedly refers to the existence of no past mental health treatment, no psychiatric history, and no history of drug or alcohol abuse in defendant's background. According to the PSIR, when defendant was evaluated before sentencing for a 2001 criminal sexual conduct conviction involving his niece, he "indicate[d] that he [wa]s in good health and has never received any form of mental health treatment. The defendant denie[d] the use of controlled substances or alcohol, and there is no indication of a controlled substance problem or treatment." The nature of the charged shooting of the victim as detailed in defendant's handwritten letter describing the crime may indeed seem incomprehensible and deeply disturbing, as defendant suggests, but this fact does not tend to establish that in 1995 defendant lacked the "substantial capacity either to appreciate the nature and quality or the wrongfulness of his . . . conduct or to conform his . . . conduct to the requirements of the law." MCL 768.21a(1).

Thus, defendant has not overcome the strong presumption that counsel pursued a sound trial strategy to the extent that counsel declined to pursue a potential insanity defense. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Furthermore, no indication exists that counsel's failure to pursue an insanity defense deprived defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

II

Defendant next argues that the trial court erred by admitting at trial evidence that he sexually abused his niece, including photographs documenting the abuse. This Court reviews for a clear abuse of discretion a trial court's decision whether to admit evidence. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant maintains that the trial court's admission of this evidence violates MRE 404(b)(1), which prohibits the admission of evidence of a defendant's other acts or crimes when introduced solely for the purpose of showing the defendant's action in conformity with his criminal character. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). But evidence of a defendant's prior bad acts or crimes is admissible under the following circumstances: (1) the prosecutor offers the evidence for a proper purpose under MRE 404(b)(1), including to prove the defendant's scheme, plan, or system in doing an act; (2) the other acts evidence satisfies the definition of logical relevance within MRE 401; and (3) any unfair prejudice arising from the admission of the other acts evidence does not substantially outweigh its probative value, MRE 403. *Starr, supra* at 496; *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003).

In satisfaction of the first element of the admissibility test, the prosecutor offered the other acts evidence, and the trial court admitted it, for a proper noncharacter purpose expressly contemplated by MRE 404(b)(1), to illustrate defendant's "scheme, plan, or system in doing an act."

Regarding the second element of the other acts admissibility test, i.e., relevance as defined by MRE 401, the Michigan Supreme Court has explained as follows to what level of similarity the characteristics of the charged crime and evidence of other acts must rise for them to display a defendant's scheme, plan, or system in doing an act:

Today, we clarify that *evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.* . . .

* * *

In [*People v Ewoldt*, 7 Cal 4th 380, 402-403; 867 P2d 757 (1994),] the Supreme Court of California provided guidance for ascertaining the existence of a common plan used by the defendant to commit the charged and uncharged acts. As *Ewoldt* explains, the necessary degree of similarity is greater than that needed to prove intent, but less than that needed to prove identity.

“To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. For example, evidence that a search of a residence of a person suspected of rape produced a written plan to invite the victim to his residence and, once alone, to force her to engage in sexual intercourse would be highly relevant even if the plan lacked originality. In the same manner, evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense.” (*Ewoldt, supra* at 403.)

In this case, we conclude that *the trial court did not abuse its discretion in determining that defendant’s alleged assault of the complainant [the defendant’s daughter] and alleged abuse of his stepdaughter shared sufficient common features to infer a plan, scheme, or system to do the acts. The charged and uncharged acts contained common features beyond mere commission of acts of sexual abuse.* Defendant and the alleged victims had a father-daughter relationship. The victims were of similar age at the time of the abuse. Defendant allegedly played on his daughters’ fear of breaking up the family to silence them. One could infer from these common features that defendant had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetrate abuse. [*Sabin, supra* at 63-66 (emphasis added).]

With respect to the killing of the victim in this case and the other acts evidence involving defendant’s sexual abuse of his niece, these incidents share several common features. Defendant committed initial acts of sexual abuse of the victim in this case and his niece when both reached eight years of age, and the acts of abuse included penile penetration of the vagina. Defendant repeated his sexual abuse of each eight-year-old victim on multiple occasions over an extended period of time. Defendant took photographs memorializing his acts of abuse, including while penetrating the victim and his niece. Defendant also threatened both the victim and his niece to pressure them to remain silent concerning his course of sexual abuse; defendant threatened to kill

the victim if she revealed the abuse, and threatened his niece that “he was going to use the pictures against her and tell everybody it was her fault.” In light of these multiple shared similarities, a jury reasonably could infer that defendant employed a common plan, scheme, or system to achieve his repeated acts of sexual abuse against both the victim and his niece. *Sabin, supra* at 66.

Several dissimilarities exist between the evidence that defendant sexually abused the victim and the other acts evidence that he sexually abused his niece, including that the victim was not related to defendant, that defendant’s sexual abuse of his niece extended over the course of approximately six years as opposed to a couple of months with respect to the victim, and that in this case defendant shot the victim to silence her because, unlike his niece, the victim threatened to reveal his sexual abuse. Similarly, the Court in *Sabin* acknowledged that the uncharged and charged acts in that case were dissimilar in many respects.¹ The Court then noted that, “[o]n the basis of th[ese distinctions], one could infer that the uncharged and charged acts involved different modes of acting, both in terms of sexual acts and the manner in which defendant allegedly perpetrated the abuse.” *Sabin, supra* at 67. Nevertheless, in cases such as these, the Court recommended that appellate courts defer to the trial court’s comparison of the evidence. *Id.*

This case thus is one in which reasonable persons could disagree on whether the charged acts and uncharged acts contained sufficient common features to infer the existence of a common system used by defendant in committing the acts. As we have often observed, the trial court’s decision on a close evidentiary question such as this one ordinarily cannot be an abuse of discretion. We therefore conclude that the trial court did not abuse its discretion in determining, under the circumstances of this case, that the evidence was admissible under this theory of logical relevance. [*Sabin, supra* at 67-68 (citations omitted).]

We likewise find that in this case reasonable persons could either agree or disagree about whether the sexual abuse of the victim allegedly leading to her shooting and defendant’s other acts of sexual abuse of his niece contain sufficient common features supporting the inference that defendant employed a common system in committing the acts. *Id.* at 67. Consequently, we conclude that the trial court did not clearly abuse its broad discretion in finding that the instant

¹ The Supreme Court in *Sabin* cited the following multiple distinctions:

Defendant’s stepdaughter testified that, over the course of seven or eight years beginning when she was in kindergarten, defendant performed oral sex on her three to seven times weekly. The abuse took place late at night in her bedroom. She recalled one incident when she was in the fifth grade during which defendant had her lay on her side and he placed his penis between her legs. The charged act in this case, in contrast, was the only time defendant assaulted the complainant. The complainant did not allege prolonged sexual abuse. The incident occurred on a weekday afternoon, not at night while the complainant slept. The sexual act was intercourse, not oral sex. . . . [*Sabin, supra* at 67.]

alleged sexual abuse of the victim described by defendant and the other acts of sexual abuse reflect a scheme, plan, or system in doing an act. *Id.*

Because the trial court properly found that the other acts evidence establishes a scheme, plan, or system of committing sexual assaults, the other acts evidence tends to make more probable than not that the alleged sexual assault of the victim leading to the charged premeditated shooting in this case in fact occurred. *Sabin, supra* at 63-64 n 10. As the trial court also apparently recognized, the jury had to consider divergent testimony by defendant's former cellmate, Jose Garcia, and defendant concerning the origin of the incriminating handwritten letter and hand drawn maps, and the scheme, plan, or system evidence tends to undercut and make less probable defendant's contention that Garcia fabricated the documented story about defendant's involvement in the alleged sexual abuse and shooting of the victim. *Id.* at 57; *Starr, supra* at 501-502 (finding admissible other acts evidence of sexual abuse to rebut the defendant's claim that the charges were fabricated).

With respect to the requisite balancing under MRE 403, the trial court correctly characterized as "high" the level of probative value of the other acts evidence toward establishing that defendant did in fact sexually abuse the victim as a prelude to shooting her, as described in the handwritten letter. The other acts evidence also has substantial probative value toward rebutting defendant's assertion that Garcia simply made up the allegations in the handwritten letter. Although the other acts evidence including the photographs of defendant and his niece certainly appear "'depraved,' and of 'monstrous repugnance,' such characteristics were inherent in the underlying crime of which defendant stood accused," and therefore, admission of the other acts evidence did not inject *unfair* prejudice into the trial. *Starr, supra* at 499-500. Because the other acts evidence had high probative value, we conclude that the trial court did not abuse its discretion when it found that the "probative value of the evidence is not substantially outweighed by the danger of unfair prejudice," especially in light of the facts that (1) the trial court limited the prosecutor to describing at trial only four of the ten photographs documenting defendant's sexual abuse of his niece; (2) the prosecutor elicited testimony from Sgt. William Ware describing four of the photographs depicting defendant's sexual abuse of his niece, and did not publish the photographs to the jury during his case-in-chief; (3) immediately after Ware's testimony concerning the other acts concluded, the trial court read a limiting instruction cautioning the jury that if it believed the evidence it "may only think about whether this evidence tends to show that . . . Defendant used a plan, system, or characteristic scheme that he has used before or since," and not "to decide it shows . . . defendant is a bad person. . . . [o]r, that he is likely to commit crimes"; and (4) the trial court repeated the limiting instruction during its final charge to the jury. See *Sabin, supra* at 71 (noting that the "MRE 403 determination is best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony") (internal quotation omitted).

Defendant additionally maintains that the trial court erred by denying his motion to suppress the statements he made to the police after he was arrested for the victim's death. There is no indication in the lower court record that defendant ever moved to suppress any police statement. Further, the available record does not disclose that defendant made any incriminating statements during his police interview, but instead maintained his innocence in a manner consistent with his testimony at trial. We therefore conclude that defendant has failed to establish that any unpreserved error in the admission of evidence regarding his statements to the

police affected the outcome of his trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Similarly, to the extent defendant suggests that counsel was ineffective for failing to arrange a hearing concerning a motion to suppress his statements, defendant cannot “demonstrate a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable.” *Rodgers, supra* at 714 (emphasis in original).²

Affirmed.

/s/ Christopher M. Murray
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto

² In his brief on appeal, defendant also includes a one-sentence argument that Sgt. Ware’s testimony regarding out-of-court statements by defendant’s niece “was inadmissible hearsay barred under MRE 802 and was violative of the Confrontation Clause,” citing generally *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Like the defendant in *People v Geno*, 261 Mich App 624, 630; 683 NW2d 687 (2004), defendant here “presents, at best, a cursory argument concerning why the admission of the child’s statement violated his constitutional rights under that clause.”

Even were we to consider the merits of defendant’s preserved hearsay contention and unpreserved Confrontation Clause claim, we would conclude that his arguments lack merit. First, during defense counsel’s opening statement, he injected the topic of defendant’s prior criminal conduct, not the prosecutor, by mentioning that defendant previously had engaged in “sexual conduct that he did with his niece, who is under age. In his world they were in love.” *To impeach* counsel’s assertion, as well as defendant’s statements during his post-arrest interview with Ware that he began to have consensual sex with his niece when she reached fourteen years of age and that he loved his niece, and defendant’s subsequent testimony that his teenaged niece began having consensual sex with him, the prosecutor properly elicited Ware’s testimony that defendant’s niece recalled that he forced her to have sex between the ages of eight and fourteen and threatened her to keep silent. Second, Ware testified that he observed Sonya Gonzales make her statements to an interviewer at “Care House,” “a setting where the police officers won’t interview them [child victims], it will be someone that is trained to interview juveniles and make it kind of soft where they can feel comfortable in telling what it is they have to tell.” This Court has recognized in similar circumstances that a child’s statement “made to the executive director of the Children’s Assessment Center, not to a government employee,” “did not constitute testimonial evidence under *Crawford*, and therefore was not barred by the Confrontation Clause.” *Geno, supra* at 631.